

ENTERED

JUL 7 2006

K.R.W.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED
JUL 7 2006
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United States Bankruptcy Court
Columbia, South Carolina (5)

IN RE:

Henry D. Mack, Jr.,

Debtor(s).

C/A No. 06-02212-JW

Chapter 13

JUDGMENT

Based upon the findings of fact and conclusions of law made in the attached order, the Court grants the Motion to Extend Stay filed by Henry D. Mack, Jr. ("Debtor"). The Court, however, conditions the extension of stay as follows: (1) the Chapter 13 Trustee shall condition confirmation of Debtor's plan on Debtor providing proof and/or any other satisfactory records which indicate that Debtor has and can sustain sufficient income from his business operations to fully fund the proposed Chapter 13 plan; (2) the automatic stay shall terminate on September 14, 2006, without further order, if Debtor does not have a plan confirmed in this case on or before September 7, 2006; and (3) should this case be dismissed for any reason, dismissal shall be with prejudice to bar a re-filing by Debtor for a period of one year as to Chapter 11, 12, or 13 of the Bankruptcy Code.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
July 7, 2006

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C/A No. 06-02212-JW

Henry D. Mack, Jr.

Chapter 13

Debtor(s).

ORDER

This matter comes before the Court upon a Motion to Extend Stay ("Motion") filed by Henry D. Mack, Jr. ("Debtor") pursuant to 11 U.S.C. § 362(c)(3)(B).¹ Mr. Mack served the Motion and Notice of Hearing on all creditors. Only the Chapter 13 Trustee filed a response.

This current case (C/A No. 06-02212-jw) is Debtor's third bankruptcy filing. On October 23, 2000, Debtor and his spouse initiated a Chapter 13 bankruptcy case (C/A No. 00-09502), which was dismissed on April 6, 2004 for non-payment. On June 2, 2005, Debtor filed his second Chapter 13 case (C/A No. 05-06356), which was dismissed on December 12, 2005 for non-payment. Debtor's second case was pending and dismissed during the one (1) year period preceding the filing of this current case. Therefore, pursuant to § 362(c)(3)(A), the automatic stay provided by § 362(a) was scheduled to terminate on June 30, 2006, the thirtieth (30th) day after Debtor filed the bankruptcy petition for this current case. In order to fully consider this Motion, however, the Court extended the stay to July 14, 2006 pursuant to an interim order entered on June 30, 2006.²

Under § 362(c)(3)(C)(i)(II)(cc), there is a presumption that Debtor did not file this current case in good faith because Debtor's previous bankruptcy case was dismissed for

¹ Internal references to the Bankruptcy Code (11 U.S.C. § 101 *et seq.*), as amended by the Bankruptcy Abuse Prevention Act of 2005, shall be made by section number only.

² In the June 30, 2006 order, the Court preserved the authority to further address the issue of extending the automatic stay, and extended the stay subject to certain conditions and limitations as expressed therein.

failure to make timely plan payments. The lack of good faith presumption also arises with respect to Select Portfolio Servicing (“SPS”) pursuant to § 362(c)(3)(C)(ii) because SPS, a mortgage servicer for a secured creditor with a lien on Debtor’s home, reached a settlement agreement with Debtor to resolve a Motion for Relief from Stay that was filed before the dismissal of Debtor’s previous Chapter 13 case. In light of the presumption of a lack of good faith, Debtor is required to demonstrate, by clear and convincing evidence, that he filed this case in good faith in order to extend the automatic stay beyond July 14, 2006. 11 U.S.C. § 362(c)(3)(C).

Debtor contends that he can successfully reorganize in this case because he currently earns income through his new mortgage business. In Debtor’s prior case, Debtor earned income by working as a store manager at Rigby’s and performing mortgage consulting services part-time. During the hearing on the Motion, Debtor testified that his previous case failed because he lost his full-time employment at Rigby’s. Following the loss of his employment at Rigby’s, Debtor searched for new employment, but was unable to procure a new job. Ultimately, Debtor decided to open a new business, TMG LLC, in which he earns fees for various consulting and origination services associated with the closing of certain mortgage transactions. Debtor testified that he averages \$4,500 to \$5,000 in gross fees per month in his new business, that he averages \$3,100 per month in net fees, and that he has extensive experience in the mortgage consulting industry. The Chapter 7 Trustee acknowledged that Debtor’s budget for this current case indicated Debtor’s Chapter 13 plan was feasible. Accordingly, in light of the totality of the circumstances attendant in this case, the Court concludes that Debtor has

met his burden of proof and demonstrated that he filed this case in good faith.³ Therefore, the Court grants Debtor's Motion to Extend Stay subject to certain conditions.

The Chapter 13 Trustee, however, noted that given the speculative nature of Debtor's business, there is a risk that Debtor may be unable to consistently generate business to earn fees sufficient to fund his plan. In light of this risk, the Chapter 13 Trustee suggested that the stay be extended on an interim basis to allow the Chapter 13 Trustee to investigate the stability and finances of Debtor's business. The Court agrees. Therefore, the Court conditions the extension of stay as follows: (1) the Chapter 13 Trustee shall condition confirmation of Debtor's plan on Debtor providing proof and/or other satisfactory records which indicate that Debtor has and can sustain sufficient income from his business operations to fully fund the proposed Chapter 13 plan; (2) the automatic stay shall terminate on September 14, 2006, without further order, if Debtor does not have a plan confirmed in this case on or before September 7, 2006; and (3) should this case be dismissed for any reason, dismissal shall be with prejudice to bar a re-filing by Debtor for a period of one year as to Chapter 11, 12, or 13 of the Bankruptcy Code.

AND IT IS SO ORDERED.

Columbia, South Carolina
July 7, 2006


UNITED STATES BANKRUPTCY JUDGE

³ The Court's findings are limited to the context of this Motion and nothing in this Order shall be construed as *res judicata* to prevent Debtor, the trustee, or any party in interest from challenging or establishing that this case or plan was filed or proposed in good faith for purposes of 11 U.S.C. §§ 1307 or 1325. See *In re Charles*, 332 B.R. 538, 542 (Bankr. S.D. Tex. 2005) (holding that Congress, by enacting § 362(c)(3), intended the courts to conduct an early triage of a case and determine whether a case is doomed to fail or whether a case has a reasonable likelihood of success).